STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH SUE NICKE,

Plaintiff/Appellee,

v.

Supreme Court Docket:
No. 130666
Court of Appeals Docket:
No. 263929
Wayne County Circuit Court:
Case No. 03-335375-NI
Hon. Gershwin A. Drain

KENNETH MICHAEL MILLER, AUTOMOTIVE RENTALS INCORPORATED, HIGH VOLTAGE MAINTENANCE CORPORATION, EMERSON ELECTRIC CO.,

Defendants/Appellants.

JUAN HERNANDEZ-MORENO and STATE FARM MUTUAL AUTO-MOBILE INSURANCE COMPANY,

Defendants.

FILED

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SUPPLEMENTAL BRIEF

OF PLAINTIFF/APPELLEE IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL OF DEFENDANTS/APPELLANTS KENNETH MILLER, AUTOMOTIVE RENTALS, INC., HIGH VOLTAGE MAINTENANCE CORPORATION AND EMERSON ELECTRIC CO.

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(SUPPLEMENTAL) STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals correctly remand this matter to the trial court because (in part) the trial court imposed on Plaintiff a requirement that her serious impairment of body function be "continuous" and/or "permanent" where the No-Fault statute does not contain or impose such a requirement?

Plaintiff/Appellee answers "Yes".

Defendants/Appellants would answer "No"

The Court of Appeals would answer "Yes".

SUPPLEMENTAL STATEMENT OF FACTS

This Court has asked the parties to address at oral argument "whether the Court of Appeals erred by remanding the case to the trial court for consideration of whether plaintiff suffered a temporary serious impairment of body function." The Court allowed the parties to submit supplemental briefs on this issue.

As a result of the subject November 29, 2000 motor vehicle accident (in which Plaintiff's automobile was rear-ended by Defendants' full-size commercial van), Plaintiff was caused to suffer the following serious injuries and damages:

To Her Neck: Herniated discs at C5-C6 and C6-C7 requiring an anterior cervical

discectomy at C5-C6 and C6-C7 with bilateral foraminotomy and internal fusion at C5-6 and C6-7 with instrumentation and plating. The internal fusion is **permanent** and restricts all forms of

movement at that location.

To Her Shoulder: A "full thickness tear of the supraspinatus tendon" with "fraying

and superficial tearing of the posterior-superior labrum" of her

right shoulder requiring an open acrominoplasty to repair.

Plaintiffs' treating physicians attributed these conditions to the subject accident. She treated continuously for such conditions from the date of the subject accident through September 30, 2003 (almost three years!). Even today, she continues to take pain prescribed pain medications and anti-inflammatories.

Plaintiff missed over one year of work recovering from her accident injuries and surgical corrections, and was only able to return to sedentary employment after her no-fault insurer purchased a special (ergonomic) chair for her. In addition, the subject accident almost entirely precluded her from engaging in the active lifestyle she had enjoyed before the accident (e.g., collect, restore and sell antiques, bowl, hike, garden, prepare meals, perform household chores,

etc.).

Plaintiff does not concede that the "serious impairment of body function" she suffered as a result of the subject motor vehicle accident was "temporary." In fact, genuine issues of material fact exist that demonstrate several important aspects of her "serious impairment" likely are **permanent** in nature. At the very least, the Court of Appeals properly remanded this matter to the trial court based on the plain language of the no-fault act, and for the other reasons set forth below.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY REMANDED THIS CASE TO THE TRIAL COURT BECAUSE THE NO-FAULT ACT CONTAINS A NON-CONTINUOUS THRESHOLD AND DOES NOT REQUIRE THAT A SERIOUS IMPAIRMENT BE PERMANENT.

The Court of Appeals properly remanded this matter to the trial court for consideration of whether Deborah Nicke had met the threshold under MCL §500.3135 at any time. Although the Court of Appeals perhaps inartfully used the word "temporary" as a shorthand reference, the result and the analysis of the Court of Appeals were proper and consistent with the plain language of the No-Fault Act.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 51 1, 51 5 (1998). The first criterion in determining intent is the specific language of the statute. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411 (1999).

The No-Fault Act does not require that a person be "permanently" injured in order to recover for her loss. The threshold is one of serious impairment, not permanent impairment. MCL 500.3135(1) provides:

A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

The Legislature's requirement that a serious disfigurement be "permanent," while omitting such requirement as to "serious impairment," is presumed intentional. As this Court has recognized:

Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. *Univ of Mich. Bd. of Regents v. Auditor General*, 167 Mich. 444, 450, 132 N.W. 1037 (1911). The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. *Detroit v. Redford Twp.*, 253 Mich. 453, 456, 235 N.W. 217 (1931).

Robinson v City of Detroit, 462 Mich 439, 459; 613 NW2d 307 (2000); Farrington v Total Petroleum, Inc, 442 Mich 201, 210; 501 NW2d 76 (1993)("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.")(citations omitted); People v Babcock, 244 Mich App 64, 84; 624 NW2d 479 (2000)("The omission of a provision from one part of a statute that is included in another part of a statute must be construed as intentional."); see also People v Ramsdell, 230 Mich App 386, 392; 585 NW2d 1 (1998)("[T]he Legislature is presumed to be aware of the consequences of the use, or omission, of language when it enacts the laws that govern our behavior."). The courts give effect to each word of the statute: "We must presume that every word, phrase, and clause in the statute has meaning and avoid any construction that would render any part of the statute surplusage or nugatory." Lamp v Reynolds, 249 Mich App 591, 597; 645 NW2d 311 (2002)(citation omitted).

Giving effect to the plain language of the statute requires a finding that permanence is not a prerequisite to recovery for serious impairment injuries. Consistent with this plain language, this Court previously found that the No-Fault threshold is non-continuous. In *Byer v Smith*, 419 Mich

541; 357 NW2d 644 (1984), this Court held that "a person who is seriously impaired in body function may recover damages for pain and suffering and other sequelae of the injury after the impairment is no longer serious." 419 Mich at 544. Contrasting the "serious impairment" threshold with death and permanent serious disfigurement, this Court noted, "[o]ne may, however, recover from a serious impairment of body function." *Id.* at 545. This Court recognized and agreed that the No-Fault threshold is indeed just that: a threshold, a hurdle, and not a continuing limitation.

Even after the 1995 amendments to the No-Fault Act, the jury instructions recognized the non-continuing nature of the serious impairment threshold, as set forth in *Byer*. Michigan Civil Jury Instruction 36.01A is entitled "No-Fault Auto Negligence: Noneconomic Loss Damages for Non-Continuing Serious Impairment Threshold Injury" and provides:

If you find plaintiff suffered serious impairment of *[a body function 1 / body function 2], but [his / her] injury has ceased, or may in the future cease to be a serious impairment of *[a body function 1 / body function 2], that fact will not relieve defendant from liability for any of the noneconomic loss damages suffered by plaintiff as a proximate result of defendant's negligence.

The jury instruction cites *Byer* and *DiFranco v Picard*, 427 Mich 32, 42 n6; 398 NW2d 896, 902 n6 (1986), as the source for this instruction. The instruction faithfully follows the language of the No-Fault Act.

Under *Byer*, the remand by the Court of Appeals of the subject action was appropriate. The trial court focused on the present state of Plaintiff and based its decision on a finding that Plaintiff did not currently suffer from a serious impairment. By focusing on the present, the trial court did not, and could not, properly find that Plaintiff never crossed the threshold. Contrary to Defendants' assertion, a determination of whether Plaintiff ever crossed the threshold does no injustice to *Kreiner v Fischer*, 471 Mich 109; 683 NW2d

611 (2004), and is in conformity with the language of the statute. Consistent with the statutory language, this Court in *Kreiner* recognized "that the duration of the impairment is short does not necessarily preclude a finding of a 'serious impairment of body function." 471 Mich at 134 [emphasis added].

The grammar used in the No-Fault Act also supports remand. "[T]he Legislature is presumed to know the rules of grammar." *People v Beardsley*, 263 Mich App 408, 412-13; 688 NW2d 304 (2004). The Legislature preserved tort liability "only if the injured person **has suffered** . . . serious impairment of body function...." MCL 500.3135(1)(emphasis added). The plain language "has suffered" requires a finding that an injured party may still obtain compensation for his or her pain and suffering even if he or she has recovered from the injuries so that there is no longer a serious impairment.

"Has suffered" is the present perfect tense of the verb "suffer." *Girard v Wagenmaker*, 437 Mich 231, 242; 470 NW2d 372 (1991)("[H]as determined' is the present perfect tense of the verb 'determine."). The present perfect tense includes completed actions:

The present perfect tense generally "indicates action that was started in the past and has recently been completed or is continuing up to the present time," Sabin, ed., The Gregg Reference Manual (New York: McGraw-Hill, 6th ed, 1985), ch 10, p 192, or shows "that a current action is logically subsequent to a previous recent action." Ray & Ramsfield, Legal Writing: Getting It Right and Getting It Written (St. Paul: West Publishing Co., 1987), p 229.

Girard, 437 Mich at 242. This Court followed the *Girard* decision in *In re KH*, 469 Mich 621, 632; 677 NW2d 800 (2004)(noting that "if respondent Lagrone had sought to establish paternity under the Paternity Act, his claim would have failed for lack of standing because, at the time he sought to establish paternity, there was no prior adjudication that the children were born out of wedlock.").

In People v Stewart, 472 Mich 624; 698 NW2d 340 (2005), this Court recently reaffirmed

the plain meaning of present perfect tense:

We agree with the conflict panel in *People v. Cardenas* that the only temporal limitation the statute places on a prisoner's cooperation is that the cooperation must occur before the filing of a motion for judicial determination of cooperation. Other than that limitation, **the cooperation may occur at any time** before the prisoner is released on parole. Specifically, we agree with the following reasoning set out by Judge Wilder in his partial dissent in *Matelic* and adopted by the *Cardenas* conflict panel:

"Giving the phrases 'has cooperated' and 'have cooperated' their plain meaning, then, it is clear that the <u>Legislature intended that the prisoner's cooperation must have occurred at some time before the prisoner's application</u> for parole release under MCL 791.234(10). Similarly, the phrase 'had no relevant or useful information to provide', when given its plain meaning and considered in relation to the present perfect tense clause 'have cooperated,' expresses the Legislature's intent that the prisoner must have lacked information before the prisoner's application for treatment under MCL 791.234(10), in order to be found as a matter of law to have cooperated." [Cardenas, supra at 518, 688 N.W.2d 544, quoting Matelic, supra at 31-32, 641 N.W.2d 252.]

472 Mich at 632 (emphasis added).

Also see *Emerald Mines Co v Federal Mine Safety and Health Review Com'n*, 863 F2d 51, 56 (DC Cir 1988). In *Emerald Mines*, the court held that "the present perfect tense of the verb 'to be' in this key context denotes a wide, not narrow temporal range covering both past and present violations." 863 F2d at 56 (quoting *Nacco Mining Co v Secretary of Labor*, 9 FMSHRC 1541, 1546 (RevComm'n 1987)). As with the serious impairment language in the No-Fault Act, "nothing in the text of section 104(d)(1) restricts their use solely to ongoing violations." *Id.* As the *Emerald Mines* court stated, "The present perfect tense, however, may also cover past actions that have been completed." 863 F2d at 56 n 5.

In order to effectuate the legislative language, a trial court must not merely look at the plaintiff's status at the time the court is making its decision. This is consistent with *Kreiner* and does not signal a slippery slope erosion of *Kreiner* as Defendants herein suggest. In a similar vein

involving the use of the present tense, this Court rejected a similar argument.

In *Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004), this Court had occasion to construe the medical malpractice noneconomic damages cap contained in MCL 600.1483. Justice Markman wrote that the present tense used in §1483 meant that the condition need not exist at the time of the judgment. Specifically, the Court held that "§ 1483 permits a plaintiff to recover a maximum of \$500,000 in medical malpractice noneconomic damages if, as a result of the defendant's negligent conduct, the plaintiff at some point thereafter, and while still living, suffered one of the enumerated conditions of § 1483." 471 Mich at 562. Justice Markman relied in part on the Legislature's use of the present tense:

Not only is this understanding of § 1483, and specifically its use of the present tense of verbs, consistent with this Court's decision in *Michalski v. Bar-Levav*, 463 Mich. 723, 732-733, 625 N.W.2d 754 (2001) (construing provisions of the Handicappers Civil Rights Act, MCL 37.1101, which are also written in the present tense, yet holding that the "present" tense refers to events existing during the pendency of the plaintiff's employment, when her cause of action arose), but it also avoids the arguably incongruous results about which the trial court and Court of Appeals were concerned.

471 Mich at 563 (footnote omitted). In rejecting the argument that the condition exist at the time of the judgment, the Court rejected an argument similar to that made by Defendants here:

Defendants and the Chief Justice fail to explain why the use of the present tense of verbs in § 1483(1)(a) and (b) demonstrates that the Legislature intended that a plaintiff suffer from one of the enumerated conditions at the time of judgment, rather than at the time the action is filed, the jury is selected, opening statements are made, the first witness takes the stand, closing statements are made, at the beginning of jury deliberaions, or at the time at which the jury renders its verdict.

471 Mich at 566-67.

Similar reasoning applies to the instant action. According to Defendants, when must serious impairment exist – at the time the complaint is filed, at the time of plaintiff's deposition, at the time

of the summary disposition hearing, at the time of trial? The above authority makes clear that serious impairment may exist at any moment in time prior to the court's consideration of such issue.

II. THE COURT OF APPEALS PROPERLY REMANDED THIS MATTER TO THE TRIAL COURT TO CONDUCT A PROPER ANALYSIS UNDER THE NO-FAULT ACT.

Remand was proper where the trial court focused almost exclusively on the duration issue, where the trial court failed to make appropriate findings, and where the trial court decided disputed issues of causation.

A. Remand is proper where, as here, the trial failed to make the requisite findings.

A trial court is required to make specific factual findings before it can grant summary disposition. *May v Sommerfield*, 239 Mich App 197; 607 NW2d 422 (1999). In *May*, as here, the trial court had granted summary disposition to the defendant, after finding that the plaintiff's impairment of a body function did not affect the plaintiff's general ability to lead his normal life. However, in so deciding, the trial court did not make any factual findings as to whether (1) there was a factual dispute concerning the nature and extent of the person's injuries, or (2) the factual dispute is material to whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a).

In deciding a question of first impression, the Court of Appeals in *May* remanded the case to the trial court to make proper factual findings.

Given the clear and unambiguous language of M.C.L. § 500.3135(2)(a); MSA 24.13135(2)(a), we conclude that a trial court cannot determine whether plaintiff suffered a serious impairment of body function as a matter of law without first making the factual findings required under M.C.L. § 500.3135(2)(a)(i) or (ii); MSA 24.13135(2)(a)(i) or (ii).

Here, while the trial court entered judgment in favor of defendants as a matter of law under MCR 2.116(C)(10), it failed to make the factual findings to support its

judgment as required by M.C.L. § 500.3135(2)(a); MSA 24.13135(2)(a). We cannot decide the merits of plaintiff's appeal absent these required findings. Accordingly, we remand for further proceedings. We instruct the trial court on remand to make findings concerning whether a factual dispute exists with respect to whether plaintiff suffered a "serious impairment of body function," considering "the nature and extent" of plaintiff's injuries consistent with M.C.L. § 500.3135(2)(a)(i) or (ii); MSA 24.13135(2)(a)(i) or (ii). In determining the "nature" of plaintiff's injuries, the trial court should make appropriate findings concerning whether there is a factual dispute with respect to whether plaintiff has an "objectively manifested" impairment and, if so, whether "an important body function" is impaired. In determining the "extent" of plaintiff's injuries, the trial court should make appropriate findings concerning whether there is a factual dispute with respect to whether the impairment affects plaintiff's "general ability to lead his "normal life."

239 Mich App at 202-203. The Court of Appeals properly remanded this matter where the trial court failed to meet this standard.

Defendants herein admitted as much in the Court of Appeals. They conceded that the trial court did not make explicit findings but relied on the alleged "implicit" findings by the court. Defendants' Brief on Appeal in the Court of Appeals, at 17.

B. Remand was proper where the trial court focused primarily on duration.

In large measure, the trial court's ruling focused on the duration issue. The Court of Appeals properly remanded this case to the trial court consistent with the statute and *Kreiner*.

In Kreiner, this Court admonished the courts not to focus exclusively on one factor.

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate

question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life."

471 Mich at 133-34 (footnotes omitted – emphasis added).

The Court of Appeals herein recognized that the trial court concentrated on Plaintiff's alleged status at the time of the hearing. The trial court commented on the duration of Plaintiff's injuries without discussing any other factors. The trial court's ignoring of any other factors required remand.

C. Remand was proper where the trial court decided disputed causation issues.

Remand was proper in this case where the trial court decided the issue of aggravation of preexisting injuries. Defendants admitted as much in arguing before the Court of Appeals that the trial
court "implied" that there was no factual dispute. Defendants noted that "the trial court reasoned that
Plaintiff's neck and shoulder pain was no different than what it was before the accident."
Defendants' Brief on Appeal in the Court of Appeals, at 17. The trial court's "resolution" of this
issue was improper and required remand.

In *Kreiner*, this Court recognized that the No-Fault amendments signaled a return to the standards of *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982):

As should be evident, and as previous panels of the Court of Appeals have noted, the most uncomplicated reading of the 1995 amendment is that the Legislature largely rejected *DiFranco* in favor of *Cassidy. See, e.g., Jackson v. Nelson,* 252 Mich. App. 643, 649-650, 654 N.W.2d 604 (2002), and *Miller v. Purcell,* 246 Mich. App. 244, 248, 631 N.W.2d 760 (2001).

471 Mich at 121 n 8. Given this legislative resurrection of *Cassidy*, it is appropriate to look to *Cassidy*-era decisions for guidance under the amended No-Fault Act.

One case that survived summary disposition under the Cassidy standard has significance here and justifies the remand by the Court of Appeals. In *Galli v Reutter*, 148 Mich App 313; 384 NW2d 43 (1985), the Court of Appeals held that the question of whether the plaintiff suffered a serious

impairment was a question for the jury. The court found that it was proper to submit the question of aggravation of a pre-existing condition to the jury and upheld the denial of a new trial request:

Based upon the foregoing, we conclude that it was proper for the trial court to submit this case to the jury. The testimony of plaintiff and Drs. Maxim, Salot, and Haas demonstrated that plaintiff's injuries were objectively manifested through x-rays and passive movement tests, see Williams v. Payne, 131 Mich.App. 403, 346 N.W.2d 564 (1984), Salim v. Shepler, 142 Mich.App. 145, 369 N.W.2d 282 (1985), Argenta, supra, and substantially affected her ability to lead a normal life, see Braden v. Lee, 133 Mich.App. 215, 348 N.W.2d 63 (1984). Nevertheless, the testimony of defendant's expert, Dr. Quinn, and defense counsel's cross-examination of plaintiff's experts created a question as to whether the accident aggravated or made symptomatic plaintiff's pre-existing degenerative disease, and if so, the extent of the aggravation. Given this factual dispute, we find no error.

148 Mich App at 317-18; *Holton v A+Ins Assoc, Inc,* 255 Mich App 318, 326; 661 NW2d 248 (2003)(causation issues typically jury questions).

In the present case, the trial court discussed Plaintiff's prior conditions and decided in essence that there was no aggravation as a result of the accident. In doing so, the trial court improperly decided disputed issues that are left for the jury.

CONCLUSION AND RELIEF REQUESTED

The trial court below apparently granted Defendants' summary disposition motion based on the allegedly "temporary" nature of Plaintiff's serious impairment. In the process, the trial court improperly made findings of disputed facts relating to the nature of Plaintiff's injuries and the proximate relationship between the subject accident and such injuries. Because the No-Fault Act does not impose a "continuous" or "permanent" requirement on serious impairments of body function, and because disputed factual determinations must be made by the jury, the Court of Appeals' decision to remand this case to the trial court was correct and should be affirmed.

WHEREFORE, Plaintiff/Appellee DEBORAH SUE NICKE again respectfully asks this

Honorable Court to Deny Defendants' Application for Leave to Appeal the January 26, 2006 decision of the Court of Appeals.

ALSPECTOR, SOSIN, BARSON,
SCHAFER & SOSIN, P.C.

By:

ROBERT M. SOSIN (P35414)

Attorneys for Plaintiff/Appellee

DATED: July 20, 2006

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause via:

XXX U.S. Mail, postage paid _____ FAX ____ Federal Express

Other _____ in envelope(s) addressed to each of the attorneys of record herein (or to any party in pro per)at their respective addresses disclosed on the pleadings, on the 20th day of July 2006.